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Supreme Court, U.S.
FILED
MAY 22 1997
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No. 96-1678

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARTHUR CALDERON, WARDEN,

Petitioner,

v.

CHARLES EDWARD MOORE, JR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Morgan Chu
Counsel of Record
Spencer E. Bendell
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067-4276
(310) 277-1010

MARIANNE D. BACHERS
312 Montcalm Avenue
San Francisco, California 94110
Telephone: (415) 643-5919

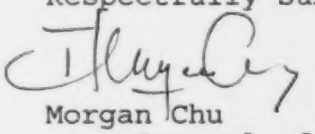
Attorneys for Respondent
Charles Edward Moore

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Charles Edward Moore, asks leave to proceed *in forma pauperis* and to file the attached brief in opposition in conformity with Supreme Court Rule 33.2. Respondent has not sought leave to proceed *in forma pauperis* in either the United States District Court or the United States Court of Appeals. However, a Motion to Proceed *in Forma Pauperis* was previously filed by the respondent with this Court on May 8, 1996, in connection with case no. 95-1612, and that motion was granted. *Calderon v. Moore*, ___ U.S. ___, 116 S.Ct. 2066 (1996). No affidavit is attached, inasmuch as the United States District Court appointed counsel for the respondent under the Criminal Justice Act of 1964.

Dated: May 22, 1997

Respectfully submitted,



Morgan Chu
Counsel of Record
Spencer E. Bendell
IRELL & MANELLA LLP

MARIANNE D. BACHERS

Attorneys for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

Morgan Chu
Counsel of Record
Spencer E. Bendell
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067-4276
(310) 277-1010

MARIANNE D. BACHERS
312 Montcalm Avenue
San Francisco, California 94110
Telephone: (415) 643-5919

Attorneys for Respondent
Charles Edward Moore

CAPITAL CASE

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I. STATEMENT OF THE CASE

Respondent Charles Edward Moore was convicted in Los Angeles County Superior Court of the murders of Robert and Hattie Crumb and was sentenced to death. The conviction was based almost exclusively on the testimony of Terry Avery, an acknowledged participant in the events who was given complete immunity. Since the time of his arrest, Moore has disputed the evidence used to convict him and sentence him to death. It was precisely because Moore disputed the prosecution evidence, and because his appointed counsel Ronald Slick failed to do so, that he demanded to represent himself. It is in this context of a genuine dispute between an accused and his counsel that this case must be viewed.

On July 22, 1983, Los Angeles County Superior Court appointed Attorney Ronald Slick to represent Moore in his pending capital case. The case was set for trial on March 5, 1984. On that date, the prosecutor moved to continue the trial date to March 9. Petitioner was not present in the courtroom, but was left sitting in an adjacent court holding cell.

On March 9, 1984, while Moore sat in the court holding cell, the trial was continued a second time, purportedly on a motion of the defense. The prosecutor advised the court that defense counsel Slick was about to begin another trial[1] before the Moore capital case could begin. Thus, neither attorney

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[1] The trial Slick finished just before Moore's began was also a murder trial. Thus, Slick was trying murder cases back to back, seemingly without a break.

Slick nor Moore were present when this continuance was granted.

On March 10, 1984, Moore wrote the Superior Court on his own and asked that he be permitted to represent himself, or alternatively, that he be granted co-counsel status, or that a second attorney be appointed to the case. Moore specifically cited *Faretta v. California*, 422 U.S. 806 (1975), in making his written request for self-representation to the superior court. Moore made specific complaints about Slick's lack of preparation for trial in the letter.[2]

Moore next appeared in court on March 16, 1984. This was the first time he was able to make his self-representation demand in person. Slick was still involved in the other murder trial.

Moore described to the Superior Court specific deficiencies he perceived in Slick's trial preparation which had precipitated his self-representation request. For instance, Moore criticized Slick's failure to litigate a motion to suppress that Moore felt was meritorious. Slick justified his handling of the issue by predicting that the

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[2] Moore's specific complaints included Slick's failure to interview an important witness, Slick's general unfamiliarity with the case and Slick's decision to leave Moore in the holding cell during the pre-trial hearings despite Moore's expressed intent to request permission to represent himself. Moore explained in the March 10 letter that these concerns had caused him to lose confidence in his attorney: "This enhances my belief that my lawyer is not representing me to the best of his ability." (Emphasis added.)

motion would be denied.[3] Likewise, Moore criticized Slick's lack of investigative efforts in the case. Slick denied that he needed more time to prepare. Since the court considered the hearing to have been an inquiry into Slick's trial preparation, he put over the *Faretta* hearing until the following Monday, March 19.

On March 19, the court ruled that Moore had to be ready to proceed to trial that day if he wanted to represent himself. Slick had just concluded the other murder trial a few hours earlier. The court did not conduct any sort of waiver inquiry pursuant to *Faretta*. The court did not find Moore was making the self-representation motion for purposes of delay. The trial court erroneously found that Slick had answered ready for trial two weeks earlier and that the convenience of the court and the out-of-state prosecution witnesses were the paramount interests to be served in proceeding to trial "forthwith."

In fact, trial did not proceed on March 19. The case was transferred to another court for trial. The prosecutor informed the judge that he was "not immediately ready," and that he would need a day and a half to two days lead time to secure the attendance of the witnesses in the case. The need

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[3] Slick's legal predictions have previously been proven fallible. He was found to have provided ineffective assistance of counsel in *In re Wilson*, 838 P.2d 1222, 1228-29 (Cal. 1992), *cert. denied*, 507 U.S. 1006 (1993), when he failed to make a motion to preclude use of statements obtained from Wilson in violation of *Massiah v. United States*, 377 U.S. 201 (1964). The court found that Slick prejudicially failed to make a meritorious objection to incriminating evidence as a result of ignorance or misunderstanding of the law.

to litigate other pre-trial motions was also discussed, and the trial was continued to March 20.

The trial was eventually continued until March 26, when jury selection began. The jury was not empaneled until March 29. After the prosecution rested in the guilt phase, Moore renewed his motion to represent himself in order to give the closing argument. Moore complained that there were crucial, material facts he wanted brought to the jury's attention during summation, and that Slick refused to bring up the evidence. The trial court denied Moore's motion.

II. REASONS WHY THE PETITION SHOULD BE DENIED

A. The Granting of the Writ of Habeas Corpus in this Case Did Not Require the Establishment of a "New Rule" under *Teague v. Lane* Inasmuch as the Finding of a Violation of Moore's Sixth Amendment Right was Compelled by Precedent Existing at the Time Moore's Conviction Became Final.

As is more fully explained in section II.B., *infra*, because Moore made his self-representation request "weeks before trial," the state court's decision that Moore was not entitled to represent himself was contrary to clearly established Federal law, as determined by this Court in *Faretta v. California*, *supra*. As a result, there can be no dispute that the district court's decision that Moore's request to represent himself was unconstitutionally denied was compelled by precedent existing at the time Moore's conviction became final. Habeas relief is, therefore, not barred by *Teague v. Lane*, 489 U.S. 288 (1989). *See Saffle v. Parks*, 494 U.S. 484, 488 (1990).

The direct conflict between the state court's denial of Moore's self-representation request and *Faretta* itself should be sufficient to end the inquiry about whether the decision was dictated by precedent. *See* Appendix A[4] at 7 n.2 (*Moore v. Calderon*, 108 F.3d 261, 264 n.2 (9th Cir. 1997)); Appendix B at 40-41 ("Because the state court appears to perceive that any self-representation request that could require a continuance would be *per se* untimely, it has come perilously close to declaring the right to represent oneself (especially in non-capital cases), while frequently available as a matter of theory, is virtually never available in reality. The rule adopted by the state court appears to be in direct conflict with *Faretta* itself."). Because Moore's self-representation request was made "well before trial," before jury selection had even begun, and not for purposes of delay, it was timely under any reasonable interpretation of *Faretta*. There seems to be little need to exhaustively survey the surrounding legal landscape when Mr. Moore stands on exactly the same point on the legal map as did the defendant in *Faretta*. However, inasmuch as the State has argued that there is a conflict among the lower courts as to the timeliness of a request such as Moore's, it is worthwhile to note that Moore's request could not properly be denied as untimely under any standard

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[4] References to the Opinions below which were filed by the petitioner Calderon (the "State") as Appendices to Petition for Writ of Certiorari are identified herein as Appendix A and B.

employed by the lower courts, and the district court so found. Appendix B at 44-51.

1. Ninth Circuit Precedent Extant at the Time that Moore's Conviction Became Final Made Clear that His Self-Representation Request Could Not Properly Be Denied as Untimely.

Long before Moore's conviction became final in March of 1990 (and, indeed, before he was even tried), the Ninth Circuit had held that, under *Faretta*, a self-representation request is timely if made prior the empanelment of the jury, so long as the request is not made for purposes of delay. *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982); *Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *Armant v. Marquez*, 772 F.2d 552 (9th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986). The Ninth Circuit had applied that analysis to the *habeas* review of state court convictions. *Id.* A variety of other jurisdictions had adopted the same formulation of timeliness. *E.g.*, *United States v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986); *Chapman v. United States*, 553 F.2d 886, 894-95 (5th Cir. 1977); *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); *State v. De Nistor*, 694 P.2d 237, 242-43 (Ariz. 1985); *Barnes v. State*, 528 S.W.2d 370 (Ark. 1975); *Commonwealth v. Miller*, 383 N.E.2d 1144, 1145-46 (Mass. App. Ct. 1978); *People v. McIntyre*, 324 N.E.2d 322, 327 (N.Y. 1974); *Blankenship v. State*, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984). It is

undisputed, in this case, that Moore's request was made more than two weeks before the jury was empaneled and that the request was not made for purposes of delay. Appendix A at 6 (108 F.2d at 264); Appendix B at 49.

2. **The Denial of Moore's Request Would Also Have Been Improper under the "Meaningful Trial Proceedings" Test.**

As of the time that Moore's conviction became final a number of jurisdictions had adopted the "meaningful trial proceedings" test. *United States v. Oakes*, 853 F.2d 551, 553 (7th Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989); *Robards v. Rees*, 789 F.2d 379, 383-84 (6th Cir. 1986); *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979), *cert. denied*, 444 U.S. 1084 (1980); *State v. Nix*, 327 So. 2d 301, 354 (La. 1975), *cert. denied*, 425 U.S. 954 (1976). While the "meaningful trial proceedings" test does not focus on the empanelment of the jury as a bright dividing line, courts have tended to consider either jury selection or jury empanelment as the correct demarcation point. *See Lawrence*, 605 F.2d at 1324.[5] Inasmuch as Moore's request was made well before the case was even transferred to the trial court, this standard is also met.

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[5] Moore's request would also have been considered timely under the standard employed by the Third Circuit. The Third Circuit does not separately consider timeliness when deciding whether to grant a self-representation request, but considers whether the request was made in good faith and not for the purposes of delay. *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982).

3. Even under the Standard Adopted by California and Purportedly Applied by the California Supreme Court, Moore's Request Was Timely.

The California Supreme Court adopted its requirement that the request be made "within a reasonable time prior to the commencement of trial" as a formulation of the timeliness standard under *Faretta* in 1977. *People v. Windham*, 560 P.2d 1187, 1191-92 (Cal.), *cert. denied*, 434 U.S. 848 (1977). Under the *Windham* standard, the inquiry does not end upon determination of the proximity of trial to the request. Appendix B at 47 (citing *Windham*, 560 P.2d at 1191-92). A "late" request, even one which would require a continuance, should be granted under *Windham*, when its "lateness" can be reasonably justified. *Id.* (citing *Windham*, 560 P.2d at 128 n.5).

After having been left in his holding cell during two consecutive hearings, on March 10, 1984, more than two weeks before jury selection began and almost three weeks before the jury was empaneled, Moore wrote a letter to the court, unequivocally requesting that he be allowed to represent himself. Even if Moore's request were considered "late" and in need of justification, the undisputed record below demonstrates that Moore did provide more than sufficient justification in his letter (despite the lack of willingness by the court to consider Moore's reasons):

> Since the Attorney General does not seek to supplement the record in this regard, for purposes of summary judgment, the Court finds that Moore's reasons for the timing of his motion were those expressed in his letter.

Appendix B at 49 (footnotes omitted).

Moore learned of Slick's lack of preparation for trial on March 5, but was excluded from the March 5 hearing and the next hearing on March 9. The very next day Moore penned his letter explaining his exclusion from the hearings (despite his expression to Slick of his intention to request to represent himself), raising his concerns about Slick and requesting permission to represent himself. As the district court stated: "It is perverse to find a self-representation request untimely or unjustifiably delayed when it could not reasonably have been presented any earlier." Appendix B at 51. Put simply, and, as the district court found: "Moore acted as swiftly as reasonably could be expected." Appendix B at 50 n.34. Thus, even under the *Faretta* timeliness standard expounded by the California courts, Moore's request was improperly denied.

4. Under Any of These Lower Court Standards Moore's *Faretta* Request Should Have Been Granted.

Under any of the analytical frameworks of the lower courts described above (including the interpretation of *Faretta* adopted by the California Supreme Court in *Windham*), Moore's request could not properly be denied as untimely. Regardless of the mechanism used to reach the decision, the result of a review of Moore's conviction would have been the same no matter the court in which Moore's habeas corpus petition had been filed. Therefore, contrary to the assertions of Petitioner, there is no split among the lower

courts on the proper outcome on the facts of this case, where the request was made weeks before trial, and the timing of the request was adequately justified. Thus, the foregoing survey of the legal landscape, which was undertaken in extreme depth by the district court, has made clear that Moore was standing in the heartland of *Faretta* when he made his request to represent himself. It was on the basis of the district court's opinion which surveyed and cited cases from a panoply of United States Courts of Appeals and state courts that the Ninth Circuit affirmed the district court's decision. Thus, the fact that the Ninth Circuit's opinion did not explicitly cite cases from other jurisdictions is not reason to reverse its decision on the *Teague* issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[The Supreme] Court reviews judgments not opinions.").

B. This Case Is Factually Indistinguishable from Faretta, and, as a Result, the Denial of Moore's Self-Representation Request Was Contrary to Clearly Established Federal Law, as Determined by this Court.

As the Ninth Circuit described: "The relevant facts in this case are identical to those in *Faretta*." Appendix A at 8 (108 F.2d at 265). In this case, as in *Faretta*, Moore made his request "weeks before trial." *Id.* The State does not dispute that, as in *Faretta*, Moore's request to represent himself was made knowingly and intelligently. *Id.*; Appendix B at 36. Moreover the State does not dispute that Moore's request was not made for purposes of engendering delay, but

rather it was made because of Moore's desire to represent himself in light of his genuinely held (and, it turns out, prescient) concerns about Slick's lack of preparation for trial, which concerns Moore expressed in his March 10 letter. Moreover, the record reflects, and the district court found, that Moore made the request "as swiftly as could be expected." Appendix B at 50 n.34.

Thus, the State cannot and does not point to any fact which takes this case outside the four corners of the *Faretta* decision itself. Obviously, there can be no clearer conflict with this Court's precedent than to decide an identical case differently.[6] Thus, the Ninth Circuit was correct in holding that the state court's denial of Moore's self-representation request is contrary to clearly established Federal law, as set forth in this Court's opinion in *Faretta*.

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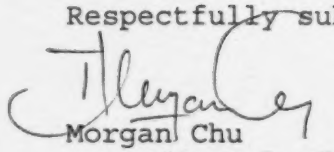
[6] The Ninth Circuit held that regardless of whether the pre- or post-amendment version of 28 U.S.C. § 2254(d) were applied to this case, the outcome would be the same. Appendix A at 5 (108 F.3d at 263-64). The granting of Moore's self-representation request was compelled by existing precedent, namely *Faretta* (as well as the lower court cases interpreting *Faretta*), Appendix A at 7 & n.2 (108 F.3d at 264 & n.2), and the denial of Moore's request was contrary to the clearly established law of *Faretta*. Appendix A at 8 (108 F.3d at 265).

III. CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Dated: May 22, 1997

Respectfully submitted,



Morgan Chu
Counsel of Record
Spencer E. Bendell
IRELL & MANELLA LLP

MARIANNE D. BACHERS

Attorneys for Respondent

IRELL & MANELLA LLP
A REGISTERED LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

333 SOUTH HOPE STREET, SUITE 3300
LOS ANGELES, CALIFORNIA 90071-3042
TELEPHONE (213) 620-1555
FACSIMILE (213) 229-0515

1800 AVENUE OF THE STARS, SUITE 900
LOS ANGELES, CALIFORNIA 90067-4276
TELEPHONE (310) 277-1010
CABLE ADDRESS: IRELLA LSA
FACSIMILE (310) 203-7199

840 NEWPORT CENTER DRIVE, SUITE 500
NEWPORT BEACH, CALIFORNIA 92660-6324
TELEPHONE (714) 760-0991
FACSIMILE (714) 760-5200

WRITER'S DIRECT DIAL NUMBER
(310) 203-7143

May 22, 1997

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MAY 23 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VIA FEDERAL EXPRESS

William K. Suter, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: Calderon v. Moore, Case No. 96-1678

Dear Mr. Suter:

Enclosed please find for filing an original and 10 copies of Respondent's Motion to Proceed In Forma Pauperis and Respondent's Brief in Opposition along with Respondent's Certificate of Service by Mail. I have also enclosed an extra copy of each document to be conformed and returned in the attached postage-paid envelope.

Thank you very much for your assistance.

Very truly yours,

Ann Holcomb

Ann Holcomb
Legal Assistant

AH:pc
Enclosures

No. 96-1678

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

RECEIVED
MAY 23 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARTHUR CALDERON, Warden, *Applicant*

v.

CHARLES EDWARD MOORE, JR., *Respondent*

CERTIFICATE OF SERVICE BY MAIL

MORGAN CHU, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1800 Avenue of the Stars, Suite 900, in the City and County of Los Angeles, State of California; that on May 22, 1997, he caused to be served one true copy of **RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS AND RESPONDENT'S BRIEF IN OPPOSITION** in the above-entitled matter on each interested party, by placing same in an envelope addressed as follows:

Daniel E. Lungren, Attorney General
George Williamson, Chief Assistant Attorney General
Ronald A. Bass, Senior Assistant Attorney General
Morris Beatus, Deputy Attorney General
Peggy S. Ruffra, Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105

Counsel for Petitioner

Said envelope was then sealed and deposited in the United States mail at Los Angeles, California, with the postage thereon fully prepaid.

MORGAN CHU